

## Hastings Race and Poverty Law Journal

Volume 16  
Number 2 Summer 2019

Article 9

Summer 2019

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Leanna Marie Sac

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### Recommended Citation

Leanna Marie Sac, *The Real Anchor Babies: How our Family Reunification Process Fails Refugee Women and Children & How We Can Do Better*, 16 HASTINGS RACE & POVERTY L.J. 313 (2019).

Available at: [https://repository.uchastings.edu/hastings\\_race\\_poverty\\_law\\_journal/vol16/iss2/9](https://repository.uchastings.edu/hastings_race_poverty_law_journal/vol16/iss2/9)

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## **The Real Anchor Babies: How our Family Reunification Process Fails Refugee Women and Children & How We Can Do Better**

LEANNA MARIE SAC\*

*Holding back tears, you say goodbye to your daughter. You are leaving Guatemala, coming to the United States, without her. You thought that you would never allow yourself to be separated from her, but the journey is too dangerous for a child, and if you stay, you will not survive. She is too little to understand why you have to leave, and why she can't go with you. You can't tell her the truth without hurting her, so you take the blame for yourself. You promise her that you won't forget her, and that you will send for her as soon as you can, then you stare into her eyes to burn the image of her face into your memory for as long as it takes until you see her again. You get to the United States, you file for asylum, and you wait. Years pass, and your daughter is getting older. She tells you that she is afraid because men in the community have begun to harass her, and she has heard stories of indigenous women being targeted for violence. Several of her friends from school have already left the country. You wonder if she realizes that you left Guatemala for the same reason, but you still can't bring yourself to tell her what happened to you. Instead, you tell her to be careful, to stay inside, to wait until your asylum is granted because when it is, she can join you in the United States. One day, she calls you, and tells you in a small, sad voice that she is pregnant. When you tell your lawyer, she says that you can still bring your daughter to the United States when your asylum is approved, but your infant grandchild must remain in Guatemala. Your daughter will now know the pain that you desperately wished to spare her: The pain of leaving a child behind.*

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\* University of California, Hastings College of the Law, J.D. Candidate, 2019. This Note was written in memory of Dominga Jeronimo Pablo (1979-2016), who spent her last days fighting to get her children to safety and see them one last time before her impending death from a terminal illness. Her daughter's children, Dominga's grandchildren, remain in Guatemala as of now, but one day, somehow, they will join their mother in the U.S. I owe great thanks to my advisor, Professor Karen Musalo. Her guidance has been invaluable to me in writing this Note, and her legacy on asylum law has left enormous shoes to fill for fledgling advocates like myself. Finally, I thank the women and girls whose struggles inspired me to write this Note and who generously shared their stories with me, sometimes opening old wounds in the process.

## I. Introduction

The scenario above is not just the story of one family. It is a frequent problem that United States (“U.S.”) immigration law should rectify. Legal reform is required to promote family unity, foster wellbeing among refugee communities, and prevent harm to children. By analyzing the account of asylum seekers from Mam Maya communities,<sup>1</sup> this note draws attention to a tragic flaw in the U.S. asylee family reunification process and proposes two simple modifications that would help keep the children and grandchildren of asylees safe from harm in their countries of origin and from the dangerous and potentially deadly journey to the U.S. across the border without advance permission.

Asylum is a type of refugee status granted to individuals who come to the U.S. fleeing persecution in their countries of origin.<sup>2</sup> Those who have been granted asylum are called asylees. From the date that asylum is granted, Asylees can petition for their spouses and any unmarried children who were not yet 21 years old at the time of the original filing to receive “derivative” asylum status based on a familial relationship to an asylee.<sup>3</sup> Asylees can petition for these family members whether those family members live in the U.S. or not.<sup>4</sup> This Note focuses on the experiences and needs particular to asylum applicants separated from their children by international borders. Asylees often wait for several years to be reunited with their children living outside the U.S.,<sup>5</sup> which can be a distressing experience for families, as children left behind in the same environments where their parents were persecuted may themselves risk being harmed before they can join their parents.<sup>6</sup> Equally troubling for asylum applicants with children outside the U.S. is the threat of an unplanned pregnancy, as asylees’ grandchildren are currently ineligible to enter the U.S. with their parents as derivative asylees.

The issues facing asylees’ family members abroad vary depending on conditions in the countries where asylees’ family members live but many

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1. The Mam Maya people are an indigenous group from Guatemala. *See infra* § I(b).

2. *See infra* § I(a). Note that individuals who also fear persecution in a country other than their countries of origin where they have legal immigration status may also qualify for asylum.

3. INA § 208(b)(3)(A), 8 U.S.C. § 1158(b)(3)(A); *see also Family of Refugees & Asylees*, U.S. CITIZENSHIP & IMMIGR. SERVS., available at <https://www.uscis.gov/family/family-refugees-asylees> (last visited May 6, 2018).

4. Adjudicator’s Field Manual, U.S. CITIZENSHIP & IMMIGRATION SERVS., §21.10 (2018) available at <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-3481/0-0-0-6022.html>.

5. *See infra* § I(e). Adjudication of asylum claims can take several years, and then the I-730 petition process adds more months, or sometimes years, to asylees’ wait for reunification with family members living outside of the U.S.

6. *See infra* § I(e).

groups of asylees and their children face similar issues raised in this Note. While this Note focuses on Mam Maya (“Mam”) mothers and daughters, the solutions proposed are intended to apply equally to all asylum applicants, their children, and grandchildren.<sup>7</sup> Focusing on the experiences of Mam women sheds light on important community issues, and provides a window into how gender-based violence and gender inequality affect the process of asylee family reunification in the U.S.

Gender-based violence and teenage pregnancy, often the result of rape, are rampant in Guatemala.<sup>8</sup> Gender-based violence is only one of many dangers that the children of asylees face. Not only is violence against women unfortunately a universal phenomenon, it is often exacerbated by social instability and inequality, meaning the countries from which most asylees flee are often dangerous places to be a woman or girl.<sup>9</sup> When asylees’ daughters are forced into early motherhood because of sexual abuse, lack of access to contraception, or both, they have their choices taken away from them again and again. Instead of receiving protection from the U.S., they are forced to choose between leaving their children behind (basically foregoing the opportunity to reunite with their parents), or turning themselves in at the U.S. border with their children. This Note first demonstrates how the current U.S. process for asylee family reunification perpetuates a cycle of gender-based violence, unplanned pregnancy, and family separation. Then, I argue two solutions to this problem: 1) allow certain asylee grandchildren<sup>10</sup> to enter

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7. For example, the Note will also focus on the impact of the flaws in the existing asylee reunification process on mother-child relationships specifically, while recognizing that similar issues can also affect father-child relationships. It stands to reason that many children of asylum applicants and asylees all over the world are in difficult and dangerous situations, and often vulnerable to the same harms that caused their parents to flee.

8. *See infra* § I(c)(3).

9. For example, El Salvador is the country of nationality most represented by individuals granted asylum by USCIS in 2016. *See* Nadwa Mossaad and Ryan Baugh, *Refugees and Asylees: 2016*, Annual Flow Report, OFFICE OF IMMIGRATION STATISTICS, (2016), 7, available at [https://www.dhs.gov/sites/default/files/publications/Refugees\\_Asylees\\_2016\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2016_0.pdf) (last visited May 6, 2018). El Salvador is also the country with the highest recorded rate of femicide, murder of women, in the world. *See* SMALL ARMS SURVEY, *Femicide: A Global Problem*, available at <https://www.files.ethz.ch/isn/140363/SAS-Research-Note-14.pdf>. Syria is the sixth most common country of nationality among individuals granted asylum by USCIS. *See* Mossaad and Baugh, *Refugees and Asylees: 2016*. There is a rape crisis in Syria where combatants are using rape as a weapon of war, much like was the case during the Civil War in Guatemala. Women are underreporting rapes due to extreme social stigma against rape victims in Syrian society. *See* Lauren Wolfe, *Syria has a Massive Rape Crisis*, THE ATLANTIC, available at <https://www.theatlantic.com/international/archive/2013/04/syria-has-a-massive-rape-crisis/274583/> (last visited May 6, 2018).

10. Throughout this note, the term “grandchildren” applies only to the children of asylees’ “children” as defined in INA § 208(b)(3), 8 U.S.C. § 1158(b)(3), meaning the biological children, adopted children or stepchildren of asylees under the age of 21 at the time the application for asylum was filed.

the U.S. with their parents, and 2) allow the children and grandchildren of asylum applicants to be paroled<sup>11</sup> (granted temporary admission) into the U.S. while their parents' asylum applications remain pending.

Some explanation about the title of this Note is owed to the reader. The title was based on a popular device in anti-immigrant rhetoric, the image of the "anchor baby." An "anchor baby" is a baby supposedly born in the U.S. to unauthorized immigrant parents for the sole purpose of providing those parents with a path to citizenship or a means to avoid deportation, despite the reality that U.S. citizen children cannot petition for their parents until they turn 21, and most of their parents still won't qualify for permanent residency at that time because of an unlawful entry.<sup>12</sup> This misrepresentation of first generation U.S. citizens is used by its proponents to exploit ignorance about our legal system and undermine the legitimacy of birthright citizenship.<sup>13</sup> The title of this Note is *The Real Anchor Babies* because unlike U.S.-born children of unauthorized immigrants, babies born in Guatemala or Mexico to Mam girls waiting to join their parents in the U.S. serve as very effective anchors. Because they are unable to immigrate to the U.S. with their mothers, they anchor families to the ongoing pain of separation, imminent danger and persecution.<sup>14</sup>

## **II. Lives Touched by an Indifferent and Inhumane Asylee Family Reunification Process**

Because the issues examined in this Note have a profound human impact, they are easiest to understand from the perspective of those affected. Case studies of Mam mothers and daughters separated during and after the asylum process supplement my analysis throughout, demonstrating how defects in existing asylum affect individuals, families, and communities. The women and girls whose stories appear in this Note were interviewed and informed that their stories are being used here, and they have consented to the use of their narratives. Their names have been changed in order to protect

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11. "Parole" is a term that can vary in meaning in immigration law. In the context of this note, the term refers to a discretionary process by which USCIS can grant temporary admission into the U.S. to an individual who might not have any other basis for entry into the country. See AMERICAN IMMIGRATION COUNCIL, *The Use of Parole Under Immigration Law*, available at <https://www.americanimmigrationcouncil.org/research/use-parole-under-immigration-law> (last visited May 6, 2018).

12. See Mariana E. Ormonde, *Debunking the Myth of the "Anchor Baby": Why Proposed Legislation Limiting Birthright Citizenship Is Not a Means of Controlling Unauthorized Immigration*, 17 ROGER WILLIAMS U. L. REV. 861, 861–863 (2012).

13. *Id.* Ironically enough, such deportations in fact also effectively deport U.S. citizen children as well when parents have no choice other than to bring their children with them to their countries of origin.

14. See *infra* § I(c)(3).

their privacy. These women and girls have all experienced parent-child separation within a context of cyclical intergenerational trauma, and while no two families experience such a separation in the same way, their shared experiences include gender-based violence, unplanned pregnancy, and a desperate struggle to get children to safety before family history repeats itself.

The purpose of the case studies is to illustrate the necessity of the changes proposed in this Note. The cycle of children left behind is not a hypothetical issue, but a very real problem that harms refugees and their children. Each of the women and girls who shared their stories experienced terrible hardship that should have been prevented if asylees could petition for their grandchildren as derivatives<sup>15</sup> or if they had a safe and legal way to bring at-risk children to the U.S. while awaiting the adjudication their asylum cases.<sup>16</sup>

### Asylum and Asylee Relative Petitions

Asylum is an immigration benefit available to people who meet the definition of a refugee. Legally, refugees are persons who have been persecuted because of their race, religion, nationality, political opinion, or membership in a particular social group<sup>17</sup> and who are already present in the U.S. or seeking admission at a port of entry, like an airport or at a customs checkpoint at the border.<sup>18</sup> Under Section 208(b)(3) of the Immigration and Nationality Act (INA), once asylum is approved, asylees can petition for their spouses and any unmarried children under 21 years old to receive derivative status<sup>19</sup> by filing form I-730 with United States Citizenship and Immigration Services (USCIS),<sup>20</sup> including proof of their asylee status and the relationship between the asylee petitioners and their relatives, the “beneficiaries.” Asylees’ spouses or children already present in the U.S. must attend an interview at a USCIS office before they are granted derivative asylum,<sup>21</sup> while asylees’ spouses or children outside the U.S. are required to attend an

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15. *See infra* § II(a).

16. *See infra* § II(b).

17. INA 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i).

18. *Id.*

19. INA 208(b)(3), 8 U.S.C. § 1158(b)(3).

20. *I-730, Refugee/Asylee Relative Petition*, U.S. CITIZENSHIP & IMMIGR. SERVS., available at <http://www.uscis.gov/i-730> (last visited May 6, 2018).

21. Until late 2017, I-730 beneficiaries living in the U.S. were not required to attend an interview. Aside from a biometrics appointment (to take fingerprints and photos in order to confirm identity and any criminal or immigration records), the process was carried out entirely by mail. *See USCIS to Expand in-Person Interview Requirements for Certain Permanent Residency Applicants*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Aug. 28, 2017), available at <https://www.uscis.gov/news/news-releases/uscis-to-expand-in-person-interview-requirements-for-certain-permanent-residency-applicants> (last visited May 6, 2018).

interview at a U.S. embassy or consulate.<sup>22</sup> This Note focuses on the latter situations, where children are outside of the U.S. when asylum is granted. However, the same legal deficiency exists in cases where asylees' grandchildren are undocumented in the U.S. at the time asylum is granted, because they are also ineligible to receive derivative asylee status. In such situations, expanding eligibility for derivative asylum to asylees' grandchildren would provide vital protection to this vulnerable group of children, who might otherwise find themselves ineligible for relief from deportation.<sup>23</sup>

Asylum applicants must file their claims within one year of entry into the U.S., but there is no requirement that the Department of Homeland Security (DHS) adjudicate asylum cases within a certain period of time. At present, applicants may wait for several years to be granted asylum.<sup>24</sup> Assuming they petition for their relatives living outside of the U.S. immediately after asylum is granted, asylum applicants can expect to wait several months until their petitions are sent to a consular office overseas for the beneficiaries to be interviewed and for final adjudication of their petitions.<sup>25</sup> Beneficiary relatives must wait to schedule their interviews, where an officer will determine if they are eligible to immigrate to the U.S. This part of the process, called "follow-to-join" takes an additional few months, but processing times can vary greatly depending on the individual circumstances and which consular office has jurisdiction over a given case.<sup>26</sup> The Department of State issues a "boarding foil," which resembles a visa and is delivered inside the beneficiary's passport.<sup>27</sup> Once a beneficiary is authorized to travel, she has to arrive in the U.S. within six months, and upon acceptance of her documents at an official U.S. port of entry (such as an airport) she becomes an asylee.

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22. *Follow-to-join Refugees and Asylees*, U.S. DEPT. OF STATE, <https://travel.state.gov/content/travel/en/us-visas/immigrate/follow-to-join-refugees-and-asylees.html>.

23. *See infra* § II(a). If asylees could petition for their grandchildren as derivatives, Reyna would not have to apply for asylum herself. Instead of requiring a severely traumatized six-year-old girl to go before an immigration judge and show how she has a well-founded fear of persecution, she could have been granted asylum through an I-730 petition like her mother Irma.

24. *See infra* § I(c)(2).

25. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 21. Form I-730 is a form where asylee "petitioners" fill information about themselves and their spouses or children, who are the "beneficiaries" in such cases. Along with the form, they send proof of their asylum grants and evidence that their relationships with their beneficiary family members are legitimate.

26. U.S. DEPT. OF STATE *supra* note 38.

27. *Id.*

### Mam Maya Communities in the Bay Area

The Mam Maya people are among the largest of 21 recognized indigenous Maya ethnic groups in Guatemala.<sup>28</sup> The majority of Mam people in Guatemala live in the departments of Huehuetenango, San Marcos, and Quetzaltenango.<sup>29</sup> Although some communities are phasing out use of the Mam language in favor of Spanish (meaning there are actually more Mam people than Mam speakers) Mam is the native language of more than 500,000 people worldwide.<sup>30</sup>

Indigenous people in Guatemala have been marginalized, exploited, and subjected to violence since the days of Spanish colonization<sup>31</sup> and subsequent economic exploitation on the part of wealthy *ladino* (non-indigenous Guatemalan) landowners<sup>32</sup> and foreign commercial interests.<sup>33</sup> During the early 1980s, injustice against indigenous people in Guatemala came to a head with the scorched earth campaign orchestrated by then-president Efraín Ríos Montt. During this campaign, the Guatemalan military massacred indigenous villages across the country in the name of weeding out the guerrilla forces who hid in the mountainous areas where many indigenous people lived. This genocide led to the mass death and displacement of indigenous people.<sup>34</sup>

During the same period, indigenous women were systematically raped by soldiers as an act of aggression against indigenous communities.<sup>35</sup> Mam Maya people and other indigenous groups in the western highlands were the hardest hit during this genocide.<sup>36</sup> Despite the best efforts of Guatemalan activists, scholars, and judges in the years after the war, Ríos Montt and most

28. WORLD DIRECTORY OF MINORITIES AND INDIGENOUS PEOPLE, *Guatemala-Maya*, <http://minorityrights.org/minorities/maya-2/>.

29. See, e.g., GRUPO CAJOLA, *Maya Mam* <https://www.grupocajola.org/maya-mam>.

30. See, e.g., ETHNOLOGUE, *Mam: A Language of Guatemala*, <https://www.ethnologue.com/19/language/mam/>.

31. The Mam Maya people have a long history of resistance against the imposition of Spanish rule, and were the last indigenous Maya group to surrender to the Spanish. See Luis Pancorbo, *Otros pueblos – Todos Santos Cuchumatán*. Televisión Española, 1989. <https://www.youtube.com/watch?v=qXEkGjCgd0>.

32. See AVIVARA, *Poverty in Guatemala*, <http://www.avivara.org/aboutguatemala/povertyinguatemala.html>.

33. GUATEMALA HUMAN RIGHTS COMMISSION, *History of Guatemala*, <http://www.ghrc-usa.org/resources/fast-facts/>.

34. See Sanford, Victoria, *Violence and Genocide in Guatemala*, Yale Genocide Studies Program, <https://gsp.yale.edu/case-studies/guatemala/violence-and-genocide-guatemala>.

35. See, Garrard-Burnett, Virginia, *Aftermath: Women and Gender Issues in Postcolonial Guatemala*, CENTER FOR DEVELOPMENT INFORMATION AND EVALUATION, U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, [http://pdf.usaid.gov/pdf\\_docs/Pnacj948.pdf](http://pdf.usaid.gov/pdf_docs/Pnacj948.pdf).

36. Wiley, Amber N., *Guatemalan Western Highlands and Lake Atitlán*, SOCIETY OF ARCHITECTURAL HISTORIANS, <http://www.sah.org/publications-and-research/sah-blog/sah-blog/2014/10/09/guatemalan-western-highlands-and-lake-atitlan%C3%A1n>.



other responsible parties have not yet been held accountable.<sup>37</sup> The peace accords ending the Guatemalan civil war were signed in 1996, but over two decades later in its aftermath and in congress with the continued isolation of indigenous communities from the Guatemalan economy and political system, indigenous communities and individuals in Guatemala are disproportionately targeted for violence.<sup>38</sup>

Due to the aforementioned shortcomings in the asylum process, Mam women who apply for asylum face delays in family reunification, which has been shown to be a difficult experience for immigrants in general.<sup>39</sup> However, in the case of asylum applicants and asylees, delays can also expose their children to the same types of persecution that they themselves have suffered,<sup>40</sup> which can make the period of separation torturous for asylum applicants. Asylum applicants cannot truly feel safe from harm until asylum is granted because of the looming possibility of being deported from the U.S., but they at least enjoy temporary protection while they await the adjudication of their claims. The relative safety that they experience, paired with the knowledge that their children are still in danger, can cause extreme feelings of guilt, retraumatization, and fear. Indigenous Guatemalan girls and young women whose mothers fled Guatemala because of gender-based violence are vulnerable to violence on account of both their gender and racial identity.<sup>41</sup> These circumstances create an endless revolving door of young mothers waiting helplessly to get their daughters to safety before they too have to make the impossible choice of whether to leave their own children behind.

For women from the Mam Maya community, pregnancy can be a direct or indirect result of their persecution. Specifically, Mam women are frequently raped and subjected to other gender-based violence leading to involuntary motherhood.<sup>42</sup> However, the U.S. immigration system expects Mam women to wait patiently for their daughters to join them in the U.S. Mam girls awaiting adjudication of a parent's asylum are effectively punished by this system for the predictable consequences of its own failings. If they are unable to avoid pregnancy while they wait to be reunited with their

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37. See Burt, Jo-Marie and Estrada, Paul, *Ríos Montt to Face Second Genocide Trial for the Dos Erres Massacre*, INTERNATIONAL JUSTICE MONITOR, <https://www.ijmonitor.org/2017/04/rios-montt-to-face-second-genocide-trial-for-the-dos-erres-massacre/>.

38. Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2015 – Guatemala*, July 2, 2015, <http://www.refworld.org/docid/55a4fa5631.html>.

39. See Kate Jastram and Kathleen Newland, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *Family Unity and Refugee Protection*, <http://www.unhcr.org/3bd3d4a14.pdf>.

40. See *In the Balance: Backlogs Delay Protection in the U.S. Asylum and Immigration Court Systems*, HUMAN RIGHTS FIRST (Apr. 2016), <http://www.humanrightsfirst.org/sites/default/files/HRF-In-The-Balance.pdf>.

41. See *infra* § I(b)(1).

42. See Michael Smith, *Racism in Guatemala*, EAST BAY SANCTUARY COVENANT (Apr. 13, 2013), <https://eastbaysanctuary.wordpress.com/2012/04/13/racism-in-guatemala/>.

mothers, then they are forced to choose between leaving their own children behind or risking further harm to themselves.

### **Factors that Perpetuate a Cycle of Young Mam Mothers Leaving Children Behind**

The act of fleeing one's country of origin and leaving children behind is a testament to the severity of the disturbance to individual and family life that must have occurred in order to make such a decision necessary. One reason that a Mam woman might flee without her children is the fact that the journey to the U.S. from Guatemala or Mexico is perilous; in 2018, there were 558 recorded deaths of migrants in the Americas, most of whom were trying to enter the U.S.<sup>43</sup> Children who attempt to make the journey, whether alone or with their parents, are exposed to dangers such as trafficking, exploitation and violence.<sup>44</sup> While a person who has recently experienced violence or other abuse may believe that she has no choice but to flee her country, she may not be as willing to gamble with her children's lives as she is with her own.

The phenomenon of parents fleeing their countries of origin and leaving children behind is not unique to the U.S., and it is not directly caused by our immigration laws.<sup>45</sup> However, the structure of the process for asylee family reunification reinforces and exacerbates family separations by failing to prioritize family reunification as a matter of policy.<sup>46</sup> In granting asylum to individuals, the U.S. government recognizes that they need protection but often denies such protection to children living in the same conditions that their family members have fled.

### **Asylees' Grandchildren are Ineligible for Derivative Asylum**

One way this process forces asylees to be separated from their families and endangers children is by not allowing asylees to include their grandchildren in asylee relative petitions for their children.<sup>47</sup> This means that if the daughter of an asylum applicant gives birth to a child before she is able

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43. *Missing Migrants*, INTERNATIONAL ORGANIZATION FOR MIGRATION, <https://missingmigrants.iom.int/region/americas>.

44. See UNICEF, *Beyond Borders: How to Make the Global Compacts on Migration and Refugees Work for Uprooted Children*, [https://www.unicef.org/publications/files/UNICEF\\_Beyond\\_Borders\\_Nov\\_2017.pdf](https://www.unicef.org/publications/files/UNICEF_Beyond_Borders_Nov_2017.pdf).

45. See generally INTERNATIONAL CENTRE FOR MIGRATION, HEALTH AND DEVELOPMENT, *Migration, Displacement and Children Left Behind*, ICMHD'S BLOG (Dec. 8, 2013), <https://icmhd.wordpress.com/2013/08/12/migration-displacement-and-children-left-behind-clbs/>.

46. See *infra* Case Study: Susana and Alicia.

47. INA § 208(3)(A); 8 U.S.C. § 1158(3)(A).

to enter the U.S. as an asylee, that child is ineligible to immigrate. If an asylee's adolescent daughter has a baby, and wishes to reunite with her mother without leaving that baby behind to join her mother in the U.S., she must wait for her mother to become a legal permanent resident through a process called "adjustment of status"<sup>48</sup> and then petition for her. In order for an asylee to become a legal permanent resident (LPR), she must file an I-485 application at least a year after being granted asylum. USCIS then determines whether she is "admissible to the U.S. for lawful permanent residence," and whether she "merit[s] the favorable exercise of discretion."<sup>49</sup>

If an asylee mother is granted LPR status, she can file a family petition for her daughter called an I-130,<sup>50</sup> and include her grandchild as a derivative of her daughter, meaning that the grandchild can immigrate with the daughter.<sup>51</sup> However, there are several reasons why the availability of the I-130 petition does not solve the problem of asylees' grandchildren being left out of the I-730 process. First, the processing of an I-130 petition takes significantly longer than that of an I-730 petition (especially if the daughter has already turned 21 years old, which will add several years to the wait time.<sup>52</sup>). Second, the I-130 process requires a legally enforceable contract between an intending immigrant and her sponsor, termed an "affidavit of support,"<sup>53</sup> in which the sponsor promises that she will "use [her] resources to support the intending immigrant(s) . . . if it becomes necessary."<sup>54</sup> In order to sponsor an immigrant relative, a petitioner must have an income at above 125 percent of the poverty line.<sup>55</sup> Many asylees, especially those with minimal education who don't know English, work minimum wage jobs.<sup>56</sup>

If an asylee's daughter does leave her baby behind with the intention of petitioning for that baby herself through an I-130 petition when she becomes a legal permanent resident, she will be separated from her child for several years, and, again, may not be able to sponsor her child to come to the U.S. because of the affidavit of support and income requirements. With her parent

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48. Green Card for Asylees, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/greencard/asylees>.

49. *Id.*

50. I-130, Petition for Alien Relative, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/i-130>.

51. INA §203(d); 8 U.S.C. § 1153(d).

52. *Visa Bulletin*, 9 U.S. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, Visa Bulletin, No. 13, at 4 (Jan. 2018), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2018/visa-bulletin-for-january-2018.html>.

53. INA § 213(a); 8 U.S.C. § 1183(a).

54. Instructions for Affidavit of Support Under Section 213A of the INA, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/sites/default/files/files/form/i-864instr.pdf>.

55. *Id.*

56. *See*, Lindsay M. Harris, *From Surviving to Thriving?: An Investigation of Asylee Integration in the United States*, 40 N.Y.U. REV. L. & SOC. CHANGE 29, 55 (2016).

or parents in the U.S., she must often leave the child behind with elderly or distant relatives, and in doing so expose her child to an unstable home situation on top of whatever political or social or instability threatens their well-being.

### **Asylum Applicants Wait for Several Years to Reunite with their Children**

Another factor that exacerbates the cycle of children left behind is backlog in asylum and immigration courts. At the beginning of the year 2018, USCIS opted to return to an arbitrary and inhumane policy for affirmative asylum interview scheduling called “last in, first out” that gives the lowest scheduling priority to interviews for people who have been waiting for years already, prioritizing newer cases instead.<sup>57</sup> Asylum claims are classified as either affirmative or defensive. Affirmative asylum claims are filed from within the U.S. by individuals who either successfully entered the country with, sometimes false, travel documents. Defensive asylum claims are filed by individuals who immigration authorities detained or otherwise determined to be removable and who apply for asylum as a defense to being removed from the country.<sup>58</sup> Affirmative asylum applicants who were in the backlog when the 2018 USCIS policy came into effect now face an indefinite wait for their interviews. Defensive asylum applicants have to wait even longer than that to have a hearing on the merits of their asylum claims.<sup>59</sup>

Backlogs in immigration courts are exacerbated for some asylum seekers because certain groups of migrants (including those with criminal records and those determined to pose a threat to public safety or national security) are prioritized for removal, and are scheduled for hearings sooner than others.<sup>60</sup> Moreover, applicants who file affirmative asylum applications that cannot be granted at an asylum office, are referred to the immigration

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57. See Memorandum, U.S. CITIZENSHIP & IMMIGR. SERVS., (Jan. 31, 2018.) 2018 WL 638160 (D.O.J.) USCIS to Take Action to Address Asylum Backlog, <https://www.uscis.gov/news/news-releases/uscis-take-action-address-asylum-backlog>.

58. See Obtaining Asylum in the U.S., U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states>.

59. Migrants in removal proceedings wait an average of two years just for their first hearing, but a hearing on the merits of their asylum cases will take another two years on average. See, e.g., TRAC IMMIGRATION, Immigration Court Backlog Tool, *Pending Cases and Length of Wait by Nationality, State, Court, and Hearing Location*, [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/). See also CENTER FOR IMMIGRATION STUDIES, *The Massive Increase in the Immigration Court Backlog: Its Causes and Solutions*, (July 24, 2017), <https://cis.org/Report/Massive-Increase-Immigration-Court-Backlog>.

60. Memorandum from John Kelly, Secretary, U.S. CITIZENSHIP & IMMIGR. SERVS., *Enforcement of the Immigration Laws to Serve the National Interest*, [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf).

court to apply for asylum once more (along with other benefits if applicable) in order to defend themselves from deportation,<sup>61</sup> and have to wait for both the asylum interview and a hearing. These asylum applicants must go through both waiting periods before they can be legally reunited with their children.

### **The Persecution of Mam Women Often Results in Pregnancy, and Pregnancy Begins Early**

The scars of persecution often manifest as physical injuries or psychological trauma, and in the case of women who have suffered gender-based persecution, they can also show up as babies. Rigid definitions of family in U.S. asylum law penalize the children of asylees for the harm that they suffer while waiting to be reunited with their parents, as well as the parents themselves who have left their children behind in desperate circumstances.

Following the genocide perpetrated by the Montt regime, women in Guatemala have suffered high rates of gender-based violence.<sup>62</sup> Indigenous women in Guatemala, a country with high rates of gender-based violence in general, are doubly victimized by gender-based violence as both women and indigenous people, because racial and cultural inequities limit their access to justice.<sup>63</sup> Like all women, they are vulnerable to gender-based violence at the hands of the men in their families and communities, but when they are harmed by indigenous men, they cannot rely on the Guatemalan government or police to protect them because of police corruption and racism towards indigenous people. Police agents often refuse to accommodate their language needs, or to even investigate when indigenous crime victims cannot afford to pay them a bribe.<sup>64</sup> When *ladino* men harm them, they face similar obstacles plus the additional fear that the police, themselves usually *ladinos*,<sup>65</sup> will

61. Asylum is never denied at an asylum office, but rather referred to an immigration court, where the applicant will have another opportunity to apply for asylum, this time defensively, meaning that they will be in removal proceedings and if they do not qualify for any type of relief, they face removal from the U.S. Types of Asylum Decisions, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/types-asylum-decisions>.

62. See Karen Musalo and Blaine Bookey, *Crimes Without Punishment: An Update on Violence Against Women and Impunity in Guatemala*, 10 HASTINGS RACE & POVERTY L.J. 265, 281 (2013).

63. See Musalo and Bookey, *supra* note 28 at 290, [https://cgrs.uchastings.edu/sites/default/files/Musalo\\_Bookey\\_CrimesWithoutPunishment\\_2013.pdf](https://cgrs.uchastings.edu/sites/default/files/Musalo_Bookey_CrimesWithoutPunishment_2013.pdf).

64. Guatemalan police forces are rife with corruption, and although the practice of police officers accepting bribes is illegal in Guatemala, police routinely ask for and accept bribes in exchange for their protection or leniency. See Guatemala Corruption Report, THE BUSINESS ANTI-CORRUPTION PORTAL, <https://www.business-anti-corruption.com/country-profiles/guatemala>.

65. See, Ami C. Carpenter, Anu Lawrence, and Milburn Line, *Contested Authorities: Alternatives to State law and order in post-conflict Guatemala*, JOURNAL OF LAW AND CONFLICT

inform the men of the accusations against them, essentially sanctioning retaliatory action.<sup>66</sup>

In Guatemala, teenage pregnancy numbers are high. According to UNICEF, as of 2014, 24 percent of Guatemalan teenagers currently living in Guatemala were already mothers.<sup>67</sup> As of 2013, according to a Guatemalan organization called *Observatorio en Salud Sexual y Reproductiva* (Sexual and Reproductive Health Observatory, or “OSAR”), Maya women had the youngest median age of first childbirth, at twenty years of age.<sup>68</sup> In most cases where girls under the age of fourteen in Guatemala became pregnant, their rapes were perpetrated by their fathers or other relatives.<sup>69</sup>

*Case Study: “Roberta and Feliciana”*

Rape is a constant threat for young women like 20-year-old Roberta, who is waiting for the asylum of her mother to be approved so that she can join her in the U.S. She lives in the town of Todos Santos Cuchumatán, Huehuetenango, Guatemala, with her maternal grandparents. Roberta has two friends who she knows have been raped, one by a male former friend and one by her much older brother. She speculates that her friends did not go to the police because they were afraid that nobody would believe them.

Unbeknownst to Roberta, Feliciana was also raped in Guatemala, which is the reason she fled to the U.S. with Roberta’s younger sister, Alejandra. Right before it happened, Feliciana had been carrying Alejandra on her back in a *rebozo* (carrying cloth). The men who raped Feliciana threw Alejandra to the ground, injuring her and stunting her development. Alejandra struggles to speak now and has learning disabilities. Feliciana hasn’t told Roberta about this because she does not want Roberta’s education to be compromised by her worrying. Although they haven’t lived together since Roberta was a little girl, it’s easy to tell they are mother and daughter from the way they

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RESOLUTION 5.3 (2013): 48 at 59, available at <http://www.academicjournals.org/journal/JLCR/article-full-text-pdf/A1B48307731>.

66. See, e.g., Lynn Stephen, *Contested Masculinities, Gender Violence and Legal Pluralism: Implications for Mam Female Refugees Seeking Gendered Justice in Guatemala and the U.S.*, Radcliffe Institute, Harvard University.

67. UNICEF, *Experiences and Accounts of Pregnancy Amongst Adolescents*. [https://www.unicef.org/lac/UNICEF\\_PLAN\\_pregnancy\\_amongst\\_adolescents\\_2015.pdf](https://www.unicef.org/lac/UNICEF_PLAN_pregnancy_amongst_adolescents_2015.pdf) (This figure does not include teenage girls who will become mothers before they turn 20.).

68. Instituto Nacional de Estadística Guatemala, *República de Guatemala: Estadísticas Vitales 2013*, [http://www.osarguatemala.org/Archivos/PDF/201510/289\\_2.pdf](http://www.osarguatemala.org/Archivos/PDF/201510/289_2.pdf). The term “Maya” has a different meaning to the term “indigenous,” due to the fact that there are also non-Maya indigenous groups in Guatemala, such as the Xinca and Garifuna.

69. See Anastasia Moloney, *Fathers rape with impunity, fueling Guatemala’s teen pregnancies: rights group*, REUTERS, available at <https://www.reuters.com/article/us-guatemala-teenage-pregnancy/fathers-rape-with-impunity-fuelling-guatemalas-teen-pregnancies-rights-group-idUSKCN0RW22D20151002>.

protect each other from suffering. Roberta fears causing worry for Felicianita, so she does not tell her mother about her own struggles. Roberta has had three boyfriends. They have all been at least verbally abusive to her, and she has also been coerced, or mentally worn down, into unwanted sex by two of them. She says that if she were to become pregnant in Guatemala, she would not seek an abortion, because she is morally opposed to it.

*Case Study: "Susana and Alicia"*

Susana was 16 years old and about five months pregnant when she made the perilous journey through Mexico into the U.S. on her own. Alicia, Susana's mother, had recently been granted asylum when she learned that Susana was pregnant from a rape, and she knew that the birth of her grandson would occur before her daughter could come to the U.S. She had also become a parent as a teenager, and was due to become a grandmother in her early thirties. Before fleeing to the U.S., Alicia had been raped twice in Guatemala, once by a group of *ladino* workers on a plantation on the coast of Guatemala and once by a group of *ladino* policemen in her municipality, Todos Santos Cuchumatán.<sup>70</sup> This was the main reason that she had left Guatemala, leaving Susana with her parents. Alicia said that when she came to the U.S., she was afraid that the same thing that happened to her would happen to her children.

Alicia had no way to know how long the asylum process would take while waiting for her asylum interview. During this time, her children called her on the phone and told her that they were afraid, that *ladinos* were harassing them, and asking where their mother was. Susana lived in terror amid warnings from women in her community that *ladino* men came around looking for Mam women to rape. Susana was raped by a group of *ladinos* at 17 while her mother's petition for her was pending, and she became pregnant with her son. When Susana realized that she would not be able to enter the U.S. before she was due to give birth, she decided to flee to the U.S. Her younger brother went to his visa interview several months later and was able to come by plane to be reunited with his mother, sister, and nephew. Nothing was gained in denying Susana the opportunity to come to the U.S. on that same flight with her brother, yet so much could have been lost. A pregnant 16-year-old rape survivor needs medical attention, support, counseling, and, most of all, her family. Instead, she had to travel through a foreign country, Mexico, without permission and risk her and her baby's lives just so that she could have a chance at a life free from continued violence.

When asked if she had considered abortion when she found out that she was pregnant, Susana responded that a baby was an "angel of God" to be

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70. As in the case of Roberta and Felicianita, Alicia has decided not to tell Susana about the rapes that she herself suffered.

looked after, not killed. Alicia used the same term to describe babies born of rape. Both mother and daughter expressed that abortion is wrong, a pregnant woman has a duty to ensure that her child is born, and to take care of that baby, regardless of its origin.

Abortion is a crime in Guatemala, punishable by prison for both the pregnant woman and the person performing the abortion.<sup>71</sup> Termination of a pregnancy on purpose is practiced very rarely among indigenous Guatemalan women. Alongside the strong cultural and religious opposition common to both indigenous and *ladino* communities, abortion is also seen by many Maya people as a tool of genocide, and a Maya woman's act of giving birth an act of resistance against genocide.<sup>72</sup> The practical consequence of the combination of these circumstances is that a rapist can impregnate a woman or girl, who, forced by these pressures to carry the baby to term must choose whether to leave her child behind to come to the U.S. or raise her child in an environment where neither of them are safe.

### Children Left Behind and Children Left Out

While the dangers posed by the journey through Mexico into the U.S. are dire and uncertain, the risks posed to the health and well-being of children separated from their parents by national borders are often more abstract. According to the General Assembly of the United Nations, children left behind by migrant parents "might also be at greater risk of psychosocial trauma, violent behavior, drug abuse and teenage pregnancy."<sup>73</sup> These are some of the risks posed to all children facing prolonged separations from their parents, but the risks for children of refugees and asylum applicants are compounded when they possess the same characteristics that their parents were persecuted for possessing. They face a constant threat to their physical safety and may be traumatized about the events that caused their parents to flee.

Asylum applicants themselves are often highly traumatized by the persecution that they have suffered.<sup>74</sup> For those parents who had to leave

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71. Código Penal, Decreto No. 17-73, Título VII, Capítulo III, Artículos 133-139 (Penal Code, Decree 17-73, art. 133-139) (Guatemala).

72. See, e.g., Fabri Antoniella, *Mayan Women and the Politics of Health*, CULTURAL SURVIVAL QUARTERLY MAGAZINE, <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/mayan-women-and-politics-health>.

73. See UN Human Rights Council, REPORT OF THE SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, ¶ 47, A/HRC/11/7 (May 14, 2009) (prepared by Jorge A. Bustamante), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.7.pdf>.

74. See *Generally Mental Health*, Refugee Health Technical Assistance Center, <http://refugeehealthta.org/physical-mental-health/mental-health/>.



children behind, the knowledge that their children are growing up in the same environment from which they had to flee in order to save their lives is terrifying and retraumatizing.<sup>75</sup> Prolonged separations can have lasting detrimental effects on relationships between parents and their children.<sup>76</sup>

*Case Study: “Adelaida and Martina”*

Adelaida was born as a result of her mother Martina’s rape<sup>77</sup> and was given permission to enter the U.S. at 15, a week before she was due to give birth. Nobody explained to Adelaida how pregnancy happens, so when she fell in love with a boy from school and discovered shortly after that she was five months pregnant, the news was a shock to her. Her mother had always told her not to let a boy get too close to her, but she didn’t know what her mother meant. Looking back on the way she felt at that time, with her mother so far away and without knowing why, she feels she was “acting out” when she became sexually active with her boyfriend.

A few days after Martina found out about the pregnancy, her petition for Adelaida was approved. An interview was scheduled for Adelaida for the month after her due date. After the U.S. Embassy was made aware of the exigent circumstances, it scheduled her an earlier interview, three weeks before her due date. She was told that she would not be able to get on a plane, because she was too close to her due date. However, after she got medical authorization to travel and prove that an airline was willing to sell her a ticket, the organization representing Martina was able to convince the Embassy to approve her visa. She boarded a plane two weeks before she gave birth to a healthy baby boy in San Francisco, Calif. Adelaida is now a legal permanent resident, and her son is a U.S. citizen. If Adelaida had been able to enter the U.S. while her mother’s asylum was pending, or if her son had been able to enter the U.S. with her as an asylee, she and Martina could have been spared

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75. See Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT’L L. 213, 213, 287 (2003) (discussing how family separation affects parents granted relief under the Convention Against Torture, which precludes family reunification. Such migrants’ children are often at risk of facing torture themselves).

76. Mara Taranhike, *Immigration Related Family Separation*, University of North Carolina Chapel Hill, available at <http://globalmigration.web.unc.edu/files/2013/09/Immigration-Related-Family-Separation.pdf>.

77. Martina has not told Adelaida that she was born as the result of a rape. The *ladino* man who held Martina prisoner in a shed and raped her multiple times, Adelaida’s biological father, decided to legally recognize Adelaida as his daughter when she was eleven or twelve years old. In fact, Martina could never have gotten Adelaida out of Guatemala on time if she hadn’t convinced her rapist to sign off on their daughter’s passport. Adelaida believes that the only harm her father ever did to Martina was to abandon her with Adelaida. Martina says that she is afraid to tell Adelaida about the circumstances of her birth because she fears that Adelaida would not believe her if she did.

the fear that Adelaida would have to choose between remaining separated from her mother and being separated from her newborn baby.

**Children of Mam Maya Asylees are at Risk of Being Persecuted while they Wait to Join their Parents in the United States**

Mam Maya parents who leave their children behind when they come to the U.S. know all too well from their own experiences that their children are in danger. In Guatemala, indigenous children have high levels of malnutrition and death from preventable diseases.<sup>78</sup> Public schools are generally only available until the sixth grade. After that, families have to pay for their children's schooling and many cannot afford it.<sup>79</sup> Schools are often too far away for children to walk to alone,<sup>80</sup> and the benefit of the education offered does not justify the danger of them being kidnapped, raped, or killed. Since the immutable characteristic of being indigenous also applies to the children of asylees, the children risk the same persecution faced by their parents. These are factors that push families to hire smugglers, or for children to enter the U.S. unaccompanied.

*Case Study: "Irma, Melvin, and Reyna."*

Irma was waiting for her father's I-730 petition for her to be adjudicated when she was raped by two *ladino* gang members in front of her four-year-old daughter, Reyna. Her father, Melvin, waited almost three years for his asylum interview. Irma fled Guatemala with Reyna and traveled through Mexico into the U.S. When they arrived at the border and turned themselves in to immigration authorities, Irma's hands were held behind their back "like when they arrest people." Because Melvin's I-730 petition for Irma had not yet been adjudicated, Irma was able to inform USCIS that she was in the U.S. and have her case transferred to a Service Center inside the U.S., where she was granted derivative asylum. Reyna now faces removal proceedings on her own and is applying for asylum. Reyna is six years old now, and although she was on track developmentally when she lived in Guatemala, since making the journey to the U.S., she has "never been the same."

Irma says that Reyna now requires a special teacher at school because

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78. See *Food Insecurity and Chronic Malnutrition in Rural Indigenous Guatemala*, SOCIETY FOR THE ANTHROPOLOGY OF FOOD AND MEDICINE, <https://foodanthro.com/2018/02/02/food-insecurity-and-chronic-malnutrition-in-rural-indigenous-guatemala/>.

79. See *Education in Guatemala*, AVIVARA, available at <http://www.avivara.org/about-guatemala/educationinguatemala.html>.

80. UNHCR, Background Note for the Agenda Item: Family Reunification in the Context of Resettlement and Integration, Annual Tripartite Consultations on Resettlement, para. I.1(b) (June 2001), available at <http://www.unhcr.org/3b30baa04.pdf>.

the unnecessary trauma that she suffered when she arrived in the U.S. has had a profound effect on her mental health and development. It's notable that Irma cites her treatment at the hands of immigration authorities as the reason for her daughter's trauma, not the rape that caused her to leave Guatemala, suggesting that she believes such an experience to be psychologically devastating on a level comparable to or greater than rape. The journey to the U.S. is terrifying because criminals target vulnerable women and children, but it is also terrifying because agents of the U.S. government at the border treat them with indignity and deprive them of their freedom upon entry, essentially punishing them for daring to ask for protection. Reyna's story shows just what is at stake when it comes to delaying family reunification, and drawing hard lines around the definition of family in asylum law.

### **III. Proposed Solutions**

This Note proposes two reforms to the existing process of asylee family reunification, one statutory modification and one regulatory change that is at the discretion of USCIS. These two changes would be most effective if implemented together but each would individually reduce the risk of harm to the children and grandchildren of asylees.

#### **Allow Asylees to Petition for their Children's Children**

Current asylum law does not allow asylees' grandchildren to benefit from asylee relative petitions. Section 208(c) of the INA restricts asylee relative petitions to spouses and unmarried children of asylees who are under the age of 21 years when their mothers or fathers file for asylum. Amending the statute to allow asylees' grandchildren to enter the U.S. with their children would mirror the process for permanent residents and U.S. citizens.<sup>81</sup> While U.S. citizens and LPRs might have greater rights than certain other types of immigrants in the U.S. in some respects, most asylees will become LPRs eventually. Family reunification at an earlier stage along the path to citizenship will help asylees integrate faster into their new communities and ensure that the children of asylees are safe with their parents as early as possible.

This reform is not just an act of charity that the U.S. can offer or withhold at will. The concept of family unity is grounded in international law and codified in domestic refugee law. Family unity is the fundamental principle of international law that recognizes the family as "the natural and fundamental group unit of society . . . entitled to protection by society and

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81. INA §203(d); 8 U.S.C. § 1153(d).

the State.”<sup>82</sup> This principle applies to refugees and is put into practice through processes of family reunification.<sup>83</sup> When our domestic laws fail to protect the most vulnerable members of refugees’ families, we fail to meet our obligations under international law.

To explain why the U.S. did not sign on to the 1951 Convention of the Status of Refugees, the Department of State Adviser on Refugees and Displaced Persons stated that “the convention was not well adapted to U.S. laws and practices, under which refugees already receive rights shared by all other legally admitted aliens and, except in special instances, are in effect assimilated in status to that of citizens.”<sup>84</sup> However, when it comes to family unity, the U.S. treats asylees differently to other immigrants.

USCIS (then INS) has previously “carefully considered” the possibility of interpreting the statute in its discretionary capacity to include grandchildren as a separate category of I-730 beneficiaries “when they are dependent on the principal refugee and reside in his/her household” but determined that this went against the plain language of the statute.<sup>85</sup> UNHCR asserts that “[a] broad definition of a family unit—what may be termed an extended family—is necessary to accommodate the peculiarities in any given refugee situation, and helps minimize further disruption and potential separation of individual members during the resettlement process.”<sup>86</sup> Because UNHCR recognizes that refugee families are often “reconstructed out of the remnants of various households, who depend on each other for mutual support and survival,”<sup>87</sup> it recommends that states tailor their processes for refugee family reunification to the needs of individual families based on the dependency principle, requiring “that economic and emotional relationships between refugee family members be given equal weight and importance in the criteria for reunification as relationships based on blood lineage or legally sanctioned unions.”<sup>88</sup> Culture is also an important consideration when it comes to honoring refugees’ family bonds, as the

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82. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) at art. 16(3) (Dec. 10, 1948). International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 at art. 23(1) (Dec. 16, 1966), and *American Convention on Human Rights*, Inter-American Specialized Conference on Human Rights OEA/Ser.L/V/II.4 rev 8, at art. 17(1) (Nov. 22, 1969).

83. Kate Jastram and Kathleen Newland, UNHCR, *Family Unity and Refugee Protection* (Draft for Discussion) at 3, available at <http://www.unhcr.org/3bd3d4a14.pdf>.

84. George L. Warren. *U.N. Action on Status of Refugees and Displaced Persons*, Department of State Bulletin, Sept. 24, 1951, 502–504.

85. Procedures for Filing a Derivative Petition (Form I-730) for a Spouse and Unmarried Children of a Refugee/Asylee [63 FR 3792] [FR 8-98] U.S. CITIZENSHIP & IMMIGR. SERVS, available at <https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-42380/0-0-0-51326/0-0-0-52015.html>.

86. UNHCR, *Supra* note 80, at para. I.1(c).

87. *Id.*

88. *Id.*

concept of what constitutes one's immediate family can vary greatly between cultures.

U.S. domestic law allows for some flexibility for refugee family reunification, but the circumstances currently accounted for are highly specific. There is an alternative process called Priority 3 (P-3) family reunification, which certain asylees (like those from designated nationalities, currently 15 countries)<sup>89</sup> and refugees can bring relatives to the U.S. whom they would not be able to bring in the under the I-730 process. Just like in the I-730 process, refugees and asylees can bring their spouses, children, and parents to the under the P-3 process.<sup>90</sup> Additionally, certain children and spouses of these relatives can also be included in the process, entering the U.S. with refugee status.<sup>91</sup> The minor grandchildren of asylees from designated countries can benefit from P-3 family reunification, and, on a case-by-case basis, other family members can also be included in the petition if they live in the same household, share resources with the immediate relative of a refugee or asylee, and have compelling humanitarian reasons to justify their inclusion.<sup>92</sup>

Thousands of refugee families were reunited through the P-3 process, but in recent years, numbers have dwindled to a few hundred per year.<sup>93</sup> Family members of asylees and refugees of nationalities that have not been designated for P-3 family reunification, such as Guatemalans, have no comparable way to reunite with family members whose relationships to them do not fit the rigid definition of "immediate family" currently eligible for derivative asylee status.

Many States already recognize the concept of dependency as a ground for reunification with family members other than spouses and children.<sup>94</sup> For example, Kenya has a much more flexible definition of family for refugees and asylees based on dependency. Kenyan law allows asylee and refugee grandparents to petition for their grandchildren, spouses, children, siblings, dependent parents, grandparents, or unrelated wards living in their households.<sup>95</sup> This is a more humane, realistic approach to refugee family reunification than that of the U.S., because the Kenyan definition of family

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89. The countries currently designated for P-3 refugee processing are: Afghanistan, Burundi, Central African Republic, Cuba, Democratic People's Republic of Korea (DPRK), Democratic Republic of Congo (DRC), Eritrea, Ethiopia, Iran, Iraq, Mali, Somalia, South Sudan, Sudan, and Syria, Proposed Refugee Admissions for Fiscal Year 2019, U.S. DEPARTMENT OF STATE, <https://www.state.gov/j/prm/releases/docsforcongress/274613.htm>.

90. Proposed Refugee Admissions for Fiscal Year 2018, U.S. DEPARTMENT OF STATE, <https://www.state.gov/j/prm/releases/docsforcongress/274613.htm>.

91. *Id.*

92. *Id.*

93. *Id.*

94. UNHCR, *Supra* note 80.

95. Refugees Act (2014) Cap. 173 § 2 (Kenya).

member accounts for a more accurate depiction of familial reality. As an example of middle ground between the current family reunification process of the U.S. and that of Kenya, Finland also allows for family reunification for family member other than guardians, spouses, and children “in rare cases for other family members who are dependent on an asylum seeker who has been granted residence.”<sup>96</sup> A similar modification to the U.S. asylum statute would not provide the same level of security to asylees’ children and grandchildren as one that expressly included them as relatives eligible for asylee family petitions, but it would allow for more flexibility in situations like those described in this Note and lead to a fairer and more humane result for the children and grandchildren of asylee applicants.

A statutory amendment allowing for asylee grandchildren to be included in the petition would constitute a significant step towards breaking the cycle of desperate young mothers leaving their children in harm’s way across generations. However, it would not keep asylum applicants’ children safe while they await adjudication. We cannot ignore the fact that girls are being raped, generally denied recognition of their bodily autonomy, and, in many cases, becoming pregnant long before they would have planned in circumstances that they would never choose. Therefore, it’s not enough to allow asylees’ children to enter the U.S. with their own children; we also need to protect them from the moment we know they are in danger.

### **Allow Asylum Applicants’ Children and Grandchildren to Enter the United States Temporarily Pending Adjudication of Parents’ Asylum Applications**

Another way to reduce harm to the children and grandchildren of asylum applicants would be to create a process by which such children could be granted parole (temporary permission to enter the U.S.)<sup>97</sup> while their parents’ or grandparents’ asylum applications are still pending. Unless and until the asylum backlog is resolved, Mam Maya asylum applicants are currently expected to stand by while their children are in danger of being targeted for violence. If they make arrangements for their children to be smuggled into the U.S., they risk losing not only their chance of attaining legal status<sup>98</sup> but their children’s as well. If they leave the U.S. for a family emergency before their asylum is adjudicated, they forfeit their applications.

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96. Finland Aliens Act § 115 (2004), *available at* <http://www.finlex.fi/en/laki/kaannokset/2004/en20040301.pdf>.

97. See AMERICAN IMMIGRATION COUNCIL, *supra* note 11.

98. See *Ramos v. Holder*, 660 F.3d 200 (4th Cir. 2011). In this case, the Fourth Circuit held that sending money to children with the knowledge that they would use that money to pay a smuggler to help them enter the U.S. constitutes alien smuggling, which renders noncitizens inadmissible or deportable. INA § 212(a)(6). INA § 237(a)(1)(E).

Admittedly, there is already a process for paroling at-risk people into the U.S. Under INA § 212(d)(5)(A), individuals outside of the U.S. request entry into the U.S. “based on humanitarian or significant public benefit reasons” in a process called humanitarian parole.<sup>99</sup> There are no additional statutory requirements for humanitarian parole, so the process would theoretically allow the children and grandchildren to enter the U.S. when they are in danger of being harmed.

However, humanitarian parole as it currently exists does not solve this problem due to practical and discretionary concerns. First, as in the case of the I-130 petition, it requires an affidavit of support, showing that the applicant will not become a “public charge,” meaning that they will not rely on public benefits from the state.<sup>100</sup> Recently granted Mam asylees are unlikely to have the necessary income or assets to qualify as a sponsor, nor the support system to secure a co-sponsor.

Second, evidence indicates that adjudicating officers apply discretion conservatively in this process. In its annual report to Congress in 2016, USCIS estimated that in 2015 only 34 percent of applicants per year were granted humanitarian parole, which is still a significant increase from the 25 percent of applicants granted that benefit in prior years.<sup>101</sup> In this report, USCIS asserts that humanitarian parole “cannot be used to circumvent normal immigration procedures and it is not a means to bypass delays in visa issuance.”<sup>102</sup> Among the factors considered by officers adjudicating applications for humanitarian parole is the availability of other means to travel and remain in the U.S. While humanitarian parole is generally only available to an applicant who has exhausted all other options for entering the U.S., USCIS currently may make an exception “in a time-sensitive situation, such as emergency surgery, where an applicant does not have adequate time to pursue other ways to enter the U.S.”<sup>103</sup>

*Case study: “Amalia and Eulalia”*

Amalia came to the U.S. as a derivative asylee to be with her mother, Eulalia, who was at the end of a six-year battle with cancer and slipped into a coma before she heard that her daughter had been given permission to travel. Amalia left two children in Guatemala, then a six-year-old and a

99. INA § 212(d)(5)(A); 8 U.S.C. 1182(d)(5)(A).

100. See *Public Charge*, U.S. CITIZENSHIP & IMMIGR. SERVS, <https://www.uscis.gov/green-card/public-charge>.

101. Maria M. Odom, 2016 USCIS Ombudsman Ann. Rep., U.S. CITIZENSHIP & IMMIGR. SERVS, available at <https://www.dhs.gov/sites/default/files/publications/CISOMB%20Annual%20Report%202016.pdf>.

102. *Id.*

103. *Id.*

newborn baby. That was two years ago. Even if Amalia could show that the danger to her children is time-sensitive such as to justify a grant of humanitarian parole, the affidavit of support requirement means that humanitarian parole will not be an option for her children. Despite her best efforts to make a good living, Amalia works a minimum wage job and lives under the poverty line. Born in a Guatemalan refugee community in Mexico and forced by circumstances to raise her younger siblings after her only known parent fled Guatemala, she was never able to go to school. She can't read or write and she only speaks Mam, which limits her ability to communicate with people from outside her community.

Amalia watches a child for another Mam family for ten dollars per night, so she says she can't find time for English classes. Her children had to stay behind with her elderly grandmother, the children's great-grandmother. Amalia's grandmother is too old and unwell to properly care for the children, so Amalia sends some of the little money she makes to pay a 15-year-old girl (herself too poor to go to school) to look after the children. She pays \$450 a month for their care. She has no family member or friend willing to co-sponsor her children if she tries to bring them to the U.S. under humanitarian parole. In fact, since an affidavit of support is also required for a family petition by a permanent resident or U.S. citizen, unless her circumstances change, she will not be reunited with her children in the foreseeable future.

The U.S. government has imagined humanitarian parole as a possible solution to asylees' grandchildren being excluded from I-730 eligibility. The Foreign Affairs Manual issued by the Department of State, in consideration of family members of asylees other than spouses and children, such as grandparents, suggests that "[i]n certain circumstances where an individual does not have the requisite relationship to the petitioner in order to qualify for follow-to-join benefits, humanitarian parole may be an option."<sup>104</sup> But to reiterate, while some asylees' grandchildren would be eligible for humanitarian parole, those with families unable to secure a sponsor for the affidavit of support would not. Another problem with this is that humanitarian parole in itself does not confer any immigration status on the person receiving it and is intended as just a means to enter the country for people who are coming for a temporary stay during an emergency.<sup>105</sup>

Humanitarian parole as it currently exists in the U.S. is incompatible with the safety and family reunification needs of asylee children and grandchildren. However, there is no need for statutory reform, because the USCIS could rescind the affidavit of support requirement at any time. The INA does not specify a requirement for an affidavit of support, nor that the benefit be granted sparingly or only when all other options are exhausted.

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104. 9 F.A.M. 203.5-1 U (f)(U).

105. See Proposed Refugee Admissions for Fiscal Year 2018, *supra* note 90, at 17–20.



These inadequacies of humanitarian parole described here were created by an exercise of discretion on the part of USCIS. Therefore a policy change on the part of USCIS is sufficient to address them.

The simplest way to do this is to modify humanitarian parole procedures directly in three ways: by creating a blanket exception to the affidavit of support requirement for the children and grandchildren of asylees, by having a presumption of eligibility where the applicant can show a risk of persecution, and through a mechanism by which asylee children entering the U.S. through humanitarian parole could include their own children in the same application. This could be done by adding a section on form I-131 (the form that applicants for humanitarian parole must fill out) that includes an option to add a child to the application or by creating a separate form exclusive to cases involving the children of asylum applicants. If USCIS determines that such a process would diverge too much from standard humanitarian parole, then a separate category of parole should be created for children and grandchildren of asylum applicants.

A special parole program for the children and grandchildren of asylum applicants would be far from unprecedented. For example, USCIS created specialty parole programs between 2014 and 2016 based around family reunification, including the Haitian Family Reunification Parole Program, Filipino WWII Veterans Parole, and Central American Minors (CAM) Parole.<sup>106</sup> These programs were designed to respond to the need for expedient alternative means of entering the U.S. for certain populations of people with an urgent need to enter the U.S.<sup>107</sup> The children of asylum applicants, may be vulnerable to persecution in their countries of origin and have no choice but to enter the U.S. as Unaccompanied Alien Children (UACs).<sup>108</sup>

CAM was a response to the surge in UACs turning themselves in or being caught at the border from the Northern Triangle countries (Guatemala, El Salvador, and Honduras).<sup>109</sup> CAM acknowledged the dangers of unauthorized entry into the U.S. and the inherent difference between our duties to adults and our duties to children. It was available to children who

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106. See Proposed Refugee Admissions for Fiscal Year 2018, *supra* note 90, at 75.

107. *Id.*

108. "UACs are children who lack lawful immigration status in the U.S., who are under the age of 18, and who either are without a parent or legal guardian in the U.S. or without a parent or legal guardian in the U.S. who is available to provide care and physical custody." See Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children, U.S. CITIZENSHIP & IMMIGR. SERVS, available at <https://www.uscis.gov/sites/default/files/USCIS/Refugee,%20Asylum,%20and%20Int%271%20Ops/Asylum/ra-qanda-determine-jurisdiction-uac.pdf> (last visited May 6, 2018).

109. See UNHCR, *supra* note 80, at 75; see also Faye Hipsman and Doris Meissner, *Administration to Bolster Central American Refugee Response*, 1 MIGRATION POLICY INSTITUTE, August 2015.

had at least one qualifying relative living in the U.S. with legal status.<sup>110</sup> Before the program was ended in November of 2017, CAM allowed some children to enter the U.S. as refugees and many more to apply for immigration benefits after arriving in the U.S.<sup>111</sup> It did not apply to the children of asylees but was intended to address the exodus of Central American children separated by multiple borders from their families.<sup>112</sup>

A parole program for the children of asylum applicants would have the purpose of reducing harm or danger to a vulnerable class of children, growing up without one or both of their parents in situations that are often dangerous. Not all children of asylum applicants are in danger. For example, some children are born or permanently resettled in a third country or lack the immutable characteristic for which their asylum applicant parents were targeted and are in fact safe in their countries of origin. USCIS could require an indication that a child (or child's family member) has a good reason to fear harm towards the child if it wanted to restrict such paroles to children in danger.

While the U.S. itself is not free from gender-based violence,<sup>113</sup> women here have more access to justice than they do in Guatemala,<sup>114</sup> which certainly deter some would-be rapists and abusers in the U.S. A program allowing for the parole of at-risk children and grandchildren of asylum applicants would, therefore, serve to protect such children and may have spared many, like Susana, both the horror of rape and the premature, unwanted physical and emotional burden of pregnancy at the age of sixteen. It could have helped Adelaida join her mother long before she was too far along to fly comfortably and without fear at 15. Amalia would be with her children. Reyna may be thriving in the first grade by now, and Roberta would be freer to pursue her education, without the additional pressure of protecting her body from invasion in order to preserve her eligibility to immigrate. Their stories are indicative of thousands of others in various circumstances and from many different countries and illuminate the desperate need to fix this issue.

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110. *In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala* (Central American Minors – CAM), U.S. CITIZENSHIP & IMMIGR. SERVS, <https://www.uscis.gov/CAM>.

111. See Proposed Refugee Admissions for Fiscal Year 2018, *supra* note 90, at 74.

112. *Id.*

113. See *Violence Against Women in the U.S.: Statistics*, NATIONAL ORGANIZATION FOR WOMEN, available at <https://now.org/resource/violence-against-women-in-the-united-states-statistic/>.

114. See generally *Fact Sheet: Violence Against Women*, YWCA, available at <http://www.ywca.org/atf/cf/%7BBF8EA0EC-D765-4988-ACD0-E6F97718CC89%7D/WWV%20Violence%20Against%20Women%20Fact%20Sheet%208-7-13.pdf>.

#### **IV. Conclusion**

The rigid framework of U.S. asylee family reunification, in conjunction with the asylum backlog, has created a situation in which asylees and their children are unable to both seek asylum in the U.S. and properly care for the youngest and most vulnerable members of their families. This mires our asylee families in guilt, fear, and re-traumatization, while endangering the wellbeing of children, many of whom will one day live in the U.S. We must put an end to the perverse rite of passage of traumatized young girls leaving babies in harm's way just to have a chance at a life free from persecution. Both a statutory provision extending eligibility for derivative asylum to grandchildren and a parole program for the children of asylum applicants would result in reduced harm to children even if implemented individually. However, each serves to address a separate piece of the problem of at-risk children left behind and should be implemented together. The expansion of eligibility would foster long-term security and unity for asylees and their families, and the parole program would allow the children of asylum applicants protection.